91-984

Number of the Case _____

In the Supreme Court of the United States

October Term, 1991

WILLIS LOUIS ADAMS, Petitioner
v.
UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether the trial court abdicated its duties under the Jencks Act when it initially accepted the erroneous statement of the prosecutor that no Jencks Act statements existed; when it, in light of that false statement, sua sponte instructed the jury that "all appropriate information required to be provided was, in fact provided," when it failed to correct this instruction after the government's principal witness swore before the jury that she had made a statement during the first three days of September containing everything that she knew about the matter in San Diego, California and had given it to the government agents; when this series of events was followed by repeated requests for the September 1, 2 or 3 statement with the result being production of other withheld Jencks Act material, seven days later, well after the witness' testimony of two post arrest statements given in a different city more than one week after the initial statement; and when, in light of this, the trial court accepted the equivocal statement of the prosecutor that no further statements existed, without any benefit of hearing, affidavits or other evidence existed as sufficient proof of the government's compliance with the Jencks Act?

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OPINION BELOW

A copy of the opinion entered by the United States Court of Appeals for the Eighth Circuit and a copy of the Order of that Court denying the Petitioner's request for rehearing and his suggestion for rehearing en banc is included in the Appendix.

BASIS FOR JURISDICTION

The judgment giving rise to this petition for writ of certiorari was rendered on July 1, 1991 and an order denying both the suggestion for en banc review and the petition for rehearing was entered on September 19, 1991.

Jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

The statute relied upon in this Petition is Title 18, United States Code, Section 3500, more commonly called the Jencks Act. Because of the length of this code section, it is set out in its entirety in the Appendix.

STATEMENT OF THE CASE

The United States Court of Appeals for the Eighth Circuit heard oral argument on March 11, 1991 and announced its decision on July 1, 1991. The Petitioner herein timely filed a Petition for Rehearing and a Suggestion of Rehearing En Banc on July 24, 1991, and that court, after requiring response by the Government, entered its Order denying the above requests on September 19, 1991.

The Petitioner urged several bases for reversal in his initial presentation, and limited his request for rehearing and for en banc consideration to the issue raised herein, the government's violation of the Jencks Act, and several assigned points of error with regard to his sentencing.

The Petitioner was tried in the District of Minnesota, with the government utilizing two of Mr. Adams' prior co-defendants as witnesses and, as its primary witness, an individual who began her cooperation well before the arrests in the instant case. That latter individual, Ursula Smith, who was not herself charged with this or any other offense because of her cooperation, testified that she, on the day of her initial cooperation, September 1, 2 or 3, 1989, gave a signed statement, in her own hand which was witnessed and retained by government agents. Though appropriate Jencks Act demands were made, that statement was never produced.

Prior to her cross-examination, the government had unequivocally reported that no statements of this witness existed. The trial court instructed the jury that the government had met its

Jencks Act obligations in their entirety.[1] On cross-examination the witness defined the statement's existence, relevancy and its importance herself when she characterized the contents as comprising "everything I knew" about the incident.

The government never produced this statement but seven days later located two September 11 statements of this witness which were provided well after her testimony. The trial court refused to require the government to provide proof that the requested statement did not exist nor to continue its search for the requested statement, accepting unquestioningly the equivocal statements of the prosecutor as to his efforts.

This case arose on direct appeal from a criminal conviction had in the United States District Court for the District of Minnesota to the United States Court of Appeals for the Eighth Circuit whose jurisdiction was invoked pursuant to Title 28, United States Code, Section 1291 and Title 18, United States Code, Section 3642.

1. The defense apparently made its Jencks Act demand before the jury.

ARGUMENT

The Jencks Act is unequivocal in its mandates that after the direct examination of a government witness, "...the court **shall**, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession **of the United States** which relates to the subject matter as to which the witness has testified. Title 18, United States Code, Section 3500. (Emphasis added).

The Petitioner moved for production; the witness, under oath, defined the statement as everything that she knew about the subject matter of the prosecution and placed it squarely in the hands of the United States.[2] The government, the trial court, and the appellate panel relieved the government of its burden to produce.

The statement at issue was given by the principal government witness on the night that she became a government informant, was first disclosed during cross-examination, and was described by her as a statement encompassing all that she knew of the endeavor.

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2. It cannot be seriously argued that knowledge of and possession residing with any agent of the government of the disputed statement cannot be imputed to the government, herein represented by an Assistant United States Attorney.

Prior to her examination, a proper, timely request was made to provide all Jencks Act materials and the government stated that none existed with regard to this witness. Apparently because the demand had been made before the jury, the court saw fit, sua sponte, to charge the jury that the government had complied with all of its discovery obligations. When the witness' own words and the subsequent, belated production of two handwritten statements put the lie to that instruction, the court did not correct the mistaken information previously imparted to the jury.

Additionally, this production of previously non-existent documents did not alert the trial court to inquire further of or to require the government to explain its prior misstatements. It required no efforts of the government beyond an equivocal statement by the prosecutor that someone from Minneapolis had called the DEA "in California" and that DEA's sole response was the production of the September 11 statements.

The trial court did not require the government to offer any proof refuting the sworn testimony of its own witness that the

statement existed nor of its efforts to locate the statement[3] and declined, even in the face of prior government misstatements as to the existence of any statement, did not require it to introduce evidence as to its efforts or even require that the government continue its search.

It is rare to see such a straight-forward breach of the Jencks Act. The government misrepresented that its principal witness had not given any prior statements, silently recanted its position when confronted with that witness' own words, and belatedly produced two statements which were clearly not the statements about which the witness had testified.

A. The number of witness statements.

The government engaged in much slight-of-hand to explain its lapses. At the appellate court it took the position that only one statement existed and that that was the post-arrest statement. It

3. The government produced no witnesses concerning the taking of the statement, no affidavits showing either its prior existence or non-existence, nor any proof of its loss or destruction. The prosecutor's sole justification for the government's breach of its duty was his recitation that some unnamed person connected with the prosecution team had placed calls to some unspecified DEA office in California and that two post-arrest statements were produced, and, to his knowledge no other statements existed. The trial court did not require any more specificity and absolutely no evidence, relying solely on the word of this litigant who asserted no personal knowledge. (See discussion infra).

based this assertion on the flimsy basis of a short question and answer exchange between defense counsel and the witness which rationally would lead a reader to the opposite conclusion, that multiple statements existed:

Q. Did you give them any other statements at that time?

A. (no audible response).

Q. Just one statement, and you signed it. Right?

A. I gave him all the statements that were involved in this operation.

Q. No. Well, my question is you signed a statement consisting of a couple of pages. Is that correct?

That's what I mean by "statement."

A. Correct.

B. The date on which the first statement was taken.

After urging a misreading of the witness' testimony to urge the conclusion that only one statement existed, it further attempted to justify its serious lapse of duty by equivocating about dates, times and locales where the witness gave statements.

The principal government witness, Ursula Smith, testified that she gave this first, complete, "everything I knew" statement during the first three days of September of 1989 in San Diego,

California to Special Agent McDermott of the Drug Enforcement Administration (DEA). Ms. Smith later cooperated in her residence area of Los Angeles with Special Agent Wood, that cooperation ultimately leading to the arrest of the petitioner and others in Minneapolis, Minnesota on September 10, 1989. She recounted the details in two statements of one page each, handwritten on September 11, 1989 and witnessed by Los Angeles Agent Wood.

C. The place in which the statement was taken.

The government refused to address the distinctions between the geographical areas of Los Angeles and San Diego California, referring instead to the Drug Enforcement "in California." The Court of Appeals likewise did not make this distinction[4]. Had they done so they would have recognized that the production of September 11 Los Angeles statements did not meet their statutory duty to produce a statement made September 1, 2, or 3 in San Diego and that the trial court had failed in its duty to require the government

4. See for instance that Court's reference, "Early in September, 1989..." and "Smith testified on cross-examination that she had given a handwritten statement to DEA agents in California during the first few days of September." Opinion at Page 3.

to follow Congressional mandates.

In the instant case the government was under a clear statutory duty to provide all prior statements of its witnesses and provided as the sole justification for its noncompliance the equivocal statement of the prosecutor. The court accepted that a call made to the DEA in California, which produced the previously non-existent September 11 statements, was sufficient expenditure of effort by all agents and agencies of the United States and that the prosecutor's equivocal statement that to his knowledge these were the only statements met the government's burden of proof on this issue.

Very few situations arise in which the government flatly fails to comply with its duty as in the instant case, hence, many cases cited herein will deal with the more litigated aspect of the Jencks Act, that is one in which the government makes representations that certain materials are or are not within the purview of the Act and whether the word of one litigant can underlay a court's finding in these circumstances.discuss the propriety of the court's acceptance of those government statements without more.

D. A Court cannot base its rulings on the issue of whether a party has met its statutory duties solely on the word of that party.

It is clear, at least in disputed areas, that the court is not free to accept the word of one of the litigants without more and cannot base its ruling solely upon that predicate. The Eighth Circuit itself so ruled in United States v. Roark, 924 F.2d 1426 (8th Cir. 1991). Therein the government urged that certain material was not producible under the Jencks Act and the Eighth Circuit held that the trial court's obligation to determine what statements were producible should not rest on the word of the government:

> The trial judge should not make a final disposition upon the representation of government counsel. United States v. Keig, 320 F.2d 634 (7th Cir. 1963). If there is any reasonable conflicting evidence, then an in camera inquiry must take place." (Citation omitted).

The Roark court cited, with approval, to the Seventh Circuit's position taken in United States v. Allen, 798 F.2d 985 (7th Cir. 1986) where that court, relying as did the Eighth Circuit on Keig, supra, stated, "The court should not make a final disposition upon the representation of government counsel. It cannot escape its duty to learn the truth firsthand." Id. at 637 (Emphasis added).

Also in accord are the Tenth Circuit, United States v. Peters, 625 F.2d 366 (10th Cir. 1980); the Eleventh Circuit, United States v. Rivera Pedin, 861 F.2d 1522 (11th Cir. 1988); and the

Ninth Circuit in United States v. Miller, 771 F.2d 1219 (9th Cir. 1985).

In each of these cases the various Courts of Appeal hold that the trial court's obligations cannot be delegated to one litigant in spite of the extra effort that it would take the court to review sometimes voluminous documents which are alleged to be producible under the Jencks Act.

In the instant cause the petitioner was deprived of his rights under the Jencks Act to have the most crucial prior statement of the most crucial government witness produced because the court abdicated its responsibilities.

The Court did not require the government to produce evidence that the statement had been taken, did not require the government to ascertain the locale of the statement, did not require the government to explain why it had misrepresented to the court that no statements existed when subsequently two statements were produced. The court did not require that affidavits, testimony or other proof be introduced. It relied solely on the word of a litigant who had been flatly wrong in his prior statements on this matter.

E. The assignment of substitute government trial counsel is not justification for the government's breach of the Jencks Act?

On at least three occasions in the appellate court the government attempted to excuse its breach of duty by explaining that the particular Assistant United States Attorney handling the matterhad been assigned the case only forty-eight hours prior to beginning of trial. (See Appellee's Initial Brief at page 8). "The prosecutor, having been given the case only forty-eight hours before trial was to begin, had no knowledge of the existence of any prior statements by Ms. Smith. Indeed, as the record subsequently established, the prosecutor did not have any statements by Ms. Smith in his possession.[5] Id. at page 15 "The prosecutor was given the case only forty-eight hours before trial and was unaware of any witness statements." The court also acknowledged that this prosecutor had little knowledge of the case when he characterized the prosecutor as "unaware."

E. The duties of the trial court.

The Eight Circuit based its finding on this issue on general

5. Of course this position is naive in that it takes the word possession and uses its literal, limited "actual possession" meaning. As the government is well aware, not only were all statements in the government's possession in this prosecutor's constructive possession, all knowledge within the government's purview must be imputed to this prosecutor.

proposition of law that a conviction will not be overturned based upon a Jencks Act violation when there is no indication of bad faith on the part of the government nor any indication of prejudice to the defendant. Because of the trial court's breach of its own duty to inquire, its own duty to require evidence of the government concerning the good or bad faith of the government, the Petitioner does not have a voluminous record on the bad faith issue.

However, the breaches of duties by the trial court and the government cannot be used as justification of the position that the government may have acted in good faith. The government had the burden of proof on the issue of its compliance with the Jencks Act and it failed miserably in its proof. Since no evidence was addressed, one can never know why it was not produced, whether its contents were detrimental to the government's case or whether it contained, for instance, Brady[6] material.

The justifications of the prosecutor who tried the case as exhibited in appellee's various briefs cannot be taken as after-the-fact proof sufficient to underlie the trial court's ruling. Cases exist

6. 373 U.S. 83 (1963).

in which government agents or prosecutors have lied with regard to the existence of statements. See for instance United States v. Tincher, 907 F.2d 600 (6th Cir. 1990). At this counterfeiting trial the government denied that any statements producible pursuant to Brady v. Maryland, supra, or under the Jencks Act existed. After a three day trial the jury found the defendant guilty.

In his appeal, the defendant urged as the basis for reversal of his conviction prosecutorial misconduct, alleging that the government improperly withheld both exculpatory and Jencks Act material, specifically the grand jury testimony of the government agent who testified, Gregory Campbell. Since the government denied that such grand jury testimony existed, it, as in this case, was not part of the Record for appellate review.

However, in the Tincher oral argument the government admitted that not only had agent Campbell actually testified before the grand jury but that the Assistant United States Attorney who stated that no Jencks Act material existed was present during the testimony. The court ruled that the statements made to the district court were deliberate misrepresentations and because prosecutorial misconduct had precluded a review of the Jencks Act material the

case was reversed and remanded to the district court for review of such testimony. In the instant case because of the breaches of duty by the trial court and the government such should also be the remedy.

As well the Ninth Circuit visited a situation where the government failed to produce Jencks Act material in United States v. Bibbero, 949 F.2d 581 (9th Cir. 1981), cert. denied, 471 U.S. 1103 (1984), reversing in that case because the substantive rights of the defendants had been violated. DEA 6's had been provided in several versions each one slightly less excised than the previous. The record as appeared before the Ninth Circuit was not clear as to whether the last version had actually been received by the defense. That court clearly held that there are no exceptions to the Jencks Act and that "all statements relevant to the subject matter of the witness' testimony must be produced after direct examination of the witness. Id. at 585 (citations omitted).

The prejudice in the instant case is manifest. The withheld statement was the word of the single most important witness presented by the government against him. This is an informant who was residing in his residence during the time that she was an active government agent. She testified that she gave a complete statement

to the DEA in San Diego. The agent saw fit to memorialize the importance of that statement by having the informant hand write and sign the statement, having the statement witnessed by other federal agents and having the statement retained by the government.

Its contents have been suppressed. The witness easily could have made statements substantially inconsistent with her trial testimony, or statements which were completely exonerative of the Petitioner. The statement should have been produced. It was not. Mr. Adams should receive a new trial at which time such statement could be utilized by him or the trial court could decide, if the statement had been intentionally or negligently handled whether the testimony of this witness should be precluded. In the lesser alternative this Court could remand the matter for further development of the Record on the instant matter.

CONCLUSION

WHEREFORE, the Petitioner seeks to have this Honorable Court, issue its writ of certiorari to the United States Court of

Appeal for the Eighth Circuit to review the issue raised herein.

Respectfully submitted,

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APPENDIX

SECTION 3500. Demands for production of statements and reports of witnesses

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order

of the court under subsection (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States means --

(1) a written statement made by said witness and signed or otherwise adopted or approved by him;

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or

(3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

(Added Pub.L. 85-269, Sept. 2, 1957, 71 Stat. 595, and amended Pub.L. 91-452, Title I, Section 102, Oct. 15, 1970, 84 Stat. 926).

Title 18, United States Code, Section 3500

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 90-5266

United States of America,	*	
	*	
Appellee,	*	
	*	
v.	*	Appeal from the United States
Willis Louis Adams, a/k/a Robyn Boutte,	*	District Court for the District of Minnesota.
Appellant.	*	

Submitted: March 11, 1991

Filed: July 1, 1991

Before WOLLMAN, Circuit Judge, FLOYD R. GIBSON, Senior Circuit Judge, and BEAM, Circuit Judge.

WOLLMAN, Circuit Judge.

Willis Louis Adams appeals his conviction for conspiracy

to possess with intent to distribute cocaine, 21 U.S.C. Section 846, interstate travel to facilitate unlawful drug activity, 18 U.S.C. Section 1952(a), and possession with intent to distribute approximately forty kilograms of cocaine, 21 U.S.C. Sections 841(a)(1), 841(b)(1)(B), 846. Adams also appeals from the district court's[1] sentence of 400 months' imprisonment. We affirm both the conviction and the sentence.

I.

From April to September 1989, Adams directed the transportation of approximately forty kilograms of cocaine from his house in California to a "stash" house in St. Paul, Minnesota. Adams conspired with four women, Jeanne Hunt, Ursula Smith, Gina Giombetti, and Diane Clark, for the delivery of the drugs on overnight flights to Minnesota. Hunt, Smith, and Giombetti acted as couriers. Clark operated the stash house.

Early in September 1989, Smith befriended a certain "Gil," who persuaded her to contact the Drug Enforcement Agency in

1. The Honorable Paul A. Magnuson, United States District Judge for the District of Minnesota.

California and report the cocaine distribution conspiracy. Smith told the DEA that a drug shipment would be made the night of September 9, 1989, and the California DEA agents informed Minnesota police. On the evening of September 9, Los Angeles police officers watched Adams, Smith, and Giombetti leave Adams' home in California, drive to the airport, buy airline tickets, and board an overnight flight to Minnesota. When they arrived at the Minneapolis-St. Paul International Airport on the morning of September 10, Minnesota police officers watched the three deplane and split up. Smith and Giombetti took a taxi to a White Castle restaurant, where Clark was to pick them up. The police officers arrested the three women in the parking lot and found two kilos of cocaine in their carry-on baggage. As these arrests were being made, Adams drove up in a taxi. Adams motioned for the taxi to keep driving, but it was stopped by police, who then arrested Adams.

Clark and Giombetti were charged with Adams in a four-count indictment. Clark pleaded guilty to attempted possession with intent to distribute cocaine in violation of 21 U.S.C. Sections 841(a)(1), 841(b)(1)(B), 846. Giombetti pleaded guilty to possession with intent to distribute cocaine in violation of 21

U.S.C. Sections 841(a)(1), 841(b)(1)(B), 846. Hunt and Smith were not charged with Adams. Smith, Clark, and Giombetti testified at trial about their involvement in Adams' cocaine enterprise.

II.

Adams contends that he was not provided with a certain statement allegedly given to DEA agents by prosecution witness Ursula Smith. He argues that this constituted a violation of the Jencks Act and requires a reversal of his conviction. Adams further argues that an accumulation of errors rendered the entire trial procedure unfair and denied him his right to due process. Adams finally argues that the procedures used to determine his sentence were faulty and that he was unfairly sentenced as a career offender on the basis of insufficient evidence.

Smith testified on cross-examination that she had given a handwritten statement to DEA agents in California during the first few days of September. Following his cross-examination of Smith, Adams' trial counsel was provided with a copy of a handwritten statement dated September 11 and signed by Smith and a DEA agent. Adams contends that the September 11 statement is not the statement to which Smith referred in her testimony at trial, and that

even if it is the one to which she referred, it was provided too late--after cross-examination--and thus did not satisfy the requirements of the Jencks Act.

The Jencks Act provides that after a witness for the government has testified on direct examination, a defendant may move for the production of any statement of that witness in the possession of the government that relates to the subject matter as to which the witness testified. 18 U.S.C. [Section] 3500. At the close of the government's direct examination of Smith, Adams made a demand for all Jencks Act material. At the time of the request, the prosecutor did not have Smith's September 11 handwritten statement.

During cross-examination, Smith said that she had made a statement that was "couple of pages" in length that she and a DEA agent had signed. She confirmed that she gave only one handwritten statement. Defense counsel then renewed his request for Jencks material, specifically Smith's handwritten statement. The prosecutor told the court that he would continue to look for the statement. Upon further inquiry, the prosecutor received a copy of a handwritten statement signed by Smith and DEA agent Lynn Wood, dated September 11, 1989, from the DEA in California.

When the trial resumed, the prosecutor gave a copy of the statement to the court and to defense counsel.

We will not overturn a conviction for noncompliance with the Jencks Act where there is no indication of bad faith on the part of the government and no indication of prejudice to the defendant. United States v. Roberts, 848 F.2d 906 (8th Cir. 1988), cert. denied, 488 U.S. 931 (1988); United States v. Moeckly, 769 F.2d 453, 464 (8th Cir. 1985), cert. denied, 476 U.S. 1104 (1986). Adams does not assert that the government acted in bad faith, and he has failed to establish that lack of the statement he seeks resulted in any prejudice to his case.

The district court found that the September 11 statement was entirely consistent with Smith's testimony. We agree. Moreover, Smith's testimony was corroborated by Clark and Giombetti. As was the district court, we are convinced that the prosecutor exercised due diligence in his efforts to comply with the requirements of the Jencks Act, and we are satisfied that another statement (written prior to September 11) simply does not exist. It is impossible to say whether there ever was such a document, but the government can not produce what it does not have. Adams' counsel vigorously cross-examined Smith, and we conclude that the

handwritten statement provided to Adams' counsel following cross-examination would not have materially added to the examination's effectiveness if it had been provided to counsel before cross-examination.

Adams argues that a number of errors committed by the trial court denied him a fair trial and due process. Adams contends that the case had dominant and prejudicial racial overtones because it was tried in a predominately white locale. He argues that because certain voir dire inquiry with regard to race and racial attitudes was precluded, the trial was unfair. We find this argument without merit. The district court acted well within its broad discretion in conducting voir dire in such a way as to screen the jury for bias and racial prejudice. The record does not reveal that the issue of race was in any way an issue at trial or a factor in Adams' conduct. The district court nevertheless questioned the panel of potential jurors thoroughly about their attitudes toward minorities.

Adams' remaining arguments regarding his conviction are without merit and do not warrant further discussion.

III.

The district court sentenced Adams to 400 months' imprisonment, followed by an 8-year term of supervised release on Count I; 60 months' imprisonment, followed by a 3-year term of supervised release on Count II; and 400 months' imprisonment, followed by an 8-year term of supervised release on Count III; all to be served concurrently.

The district court sentenced Adams as a career offender under Sentencing Guidelines Section 4B1.1. Adams contends that the district court erred in doing so because the government failed to give Adams notice that it intended to urge that Adams' sentence be enhanced under the provisions of section 4B1.1.

Prior to trial, the government served and filed an information pursuant to 21 U.S.C. Section 851 that Adams would be liable to a sentence of imprisonment of not less than ten years nor more than life if he was found guilty of Count I and/or Count III of the indictment because Adams had been convicted of a felony drug offense in California in 1983. Adams argues that although this section 851 notice may have satisfied the requirements for enhancement of a sentence under the provisions of 21 U.S.C. Section 841, the district court erred in not complying with the requirements of section 851 and instead sentencing Adams under

the provisions of Guidelines Section 4B1.1. Adams acknowledges that our decisions in United States v. Wallace, 895 F.2d 487 (8th Cir. 1990); United States v. Auman, 920 F.2d 495 (8th Cir. 1990), hold that the requirements of section 851 do not apply to sentences imposed under section 4B1.1, but asks us to reconsider Wallace and Auman in the light of United States v. Williams, 899 F.2d 1526 (6th Cir. 1990), where the Sixth Circuit held that a defendant was entitled to a section 851 notice even though he had entered into a plea bargain that stated that the offense pleaded to carried a ten-years-to-life sentence.

Whatever the merits of the Williams decision, we are not disposed, even if we were free to do so, to depart from our Wallace and Auman holdings. (We note in passing that the First Circuit has followed Wallace. United States v. Sanchez, 917 F.2d 607, 616 (1st Cir. 1991), cert. denied, 111 S. Ct. 1625 (1991).) Nor do we see anything in the Supreme Court's recent decision in Burns v. United States, 59 U.S.L.W. 4625 (U.S. June 13, 1991), that calls Wallace and Auman into question. In Burns, the defendant had entered into a plea bargain that called for a sentence falling within a particular offense level/criminal history category, an agreement that was confirmed in the probation officer's presentence report. It was not until the sentencing hearing that the defendant learned that the

district court intended to depart upward from the Guidelines sentencing range. The Court held that Rule 32 of the Federal Rules of Criminal Procedure requires notice to a defendant before a district court may sua sponte depart upward from the Guidelines sentencing range.

In Adams' case, of course, there was no plea bargain. Moreover, the government filed a section 851 information, and the presentence report clearly set forth Adams' prior convictions and stated that Guidelines Section 4B1.1 was applicable to Adams, that Adams fell within the category of a career criminal under section 4B1.1, and that such a status resulted in an offense level of 37 and a criminal history of VI, with a resulting imprisonment range of from 360 months to life imprisonment. Thus, none of the concerns expressed by the Court in Burns are present in Adams' case, and we therefore conclude that his attack upon the procedure under which he was adjudged a career criminal is without merit.

Likewise, we reject Adams' contention that insufficient evidence existed to support the district court's factual findings that Adams was a career criminal within the meaning of section 4B1.1. To establish the career criminal status, section 4B1.1 requires, among other things, two prior felony convictions of either a crime

of violence or a controlled substance offense. Adams has at least two prior felony drug convictions, both of which are final. Accordingly, the district court did not err in finding that Adams was a career criminal within the meaning of the Guidelines.

We have considered, and find to be without merit, Adams' other challenges to the procedures under which he was sentenced.

The judgment and sentence of the district court are affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 90-5266MN

United States of America, *
*
Appellee, *
* Order Denying Petition
vs. * For Rehearing and Suggestion
* For Rehearing En Banc
Willis Louis Adams, *
a/k/a/ Robyn Boutte, *

Appellant.

Suggestion for rehearing en banc, filed by the appellant has been considered by the court and is denied by reason of the lack of a majority of the active judges voting to rehear the case en banc.

Petition for rehearing is also denied.

September 19, 1991

Order Entered at the Direction of the Court.

Michael E. Gens /S/

Clerk, U.S. Court of Appeals, Eighth Circuit